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MUNICIPAL CORPORATIONS—CITY CHIEF OF POLICE—
VACANCY—PROCEDURE FOR FILING—§143.34 R.C.—PROMO-
TION—REFUSAL OF OFFICERS NEXT LOWER IN RANK—
PATROLMEN ELIGIBLE.

SYLLABUS:

In case of a vacancy in the office of chief of police in a city, such vacancy, is, under the provision of Section 143.34, Revised Code, to be filled by promotion from the next lower rank, in so far as is practicable; but when by reason of unwillingness of officers in the ranks below that of chief and above that of patrolman, to take the promotion examination, there are less than two applicants for such examination, patrolmen may be admitted to the examination, and the person receiving the highest rating shall be appointed as such chief.

Columbus, Ohio, September 12, 1958

Hon. John T. Corrigan, Prosecuting Attorney
Cuyahoga County, Clevelend, Ohio

Dear Sir:

I have before me the communication submitted to you by the Solicitor of the City of Westlake, concerning the appointment of a Chief of Police for that city, with your request that I advise as to the solution of his problem.

Although this office does not ordinarily rule on questions of purely municipal law except at the request of the bureau of supervision and inspection of public offices, the question here presented is one of such wide interest that an exception to this policy may properly be made.

The Solicitor's letter is too long to be set out in full, but I will quote certain portions thereof, and may refer to other portions as I proceed. His letter sets forth the problem as follows:

"The post of Chief of Police of the City of Westlake is vacant, as a result of the retirement of its last chief. The ranks of the department in positions subordinate to that of Chief are as follows:

1. Captain
- 1 Lieutenant
- 2 Sergeants
- Patrolmen

“The captain, the lieutenant and the sergeants have indicated a disinclination to take the examination which is to be offered for the vacant post by the Civil Service Commission. The question is therefore whether the patrolmen will be eligible to take the examination and whether the highest ranking patrolman with a passing grade will be eligible to appointment to the position of chief. There are no provisions of the Westlake Charter which affect in any way the application of the State Statutes on civil service. * * *

‘Section 143.34 Promotion of Patrolman

No positions above the rank of patrolman in the police department shall be filled by original appointment. Vacancies in positions above the rank of patrolman in a police department shall be filled by promotion from among persons holding positions in a rank lower than the position to be filled. No position above the rank of patrolman in a police department shall be filled by any person unless he has first passed a competitive promotional examination. *Promotion shall be by successive ranks so far as practicable*, and no person in a police department shall be promoted to a position in a higher rank who has not served at least twelve months *in the next lower rank*. No competitive promotional examination shall be held unless there are two persons eligible to compete. Whenever a municipal civil service commission determines that there are less than two persons holding positions in the rank next lower than the position to be filled, who are eligible and willing to compete, such commission shall allow the persons holding positions *in the then next lower rank who are eligible*, to compete with the persons holding positions in the rank lower than the position to be filled.’

“The question is therefore one which is not free from doubt. The situation appears never to have arisen before, or, at least, never to have produced a court decision or an attorney general’s ruling upon which we may rely. The questions, therefore, upon which we earnestly request that you seek a ruling from the Attorney General, are as follows:

“1) In a city having a vacancy in the position of Chief of Police, in which department there are 1 captain, 1 lieutenant, 2 sergeants and a sufficient number of otherwise eligible patrolmen, and in which neither the captain, the lieutenant nor the sergeants are willing to take an examination for promotion to the position of Chief, are any patrolmen eligible to take the examination?

“2) If the answer to question (1) is, “No,” then in what manner may the position of Chief of Police legally be filled?”

Reduced to its simplest proportion, the problem appears to be that it is necessary to fill a vacancy in the office of Chief of Police; that there is no eligible list from which such an appointment could immediately be made; and that the officers in the next rank below that of Chief and above that of Patrolman, are unwilling to enter the contest by taking a civil service examination. The city is therefore reduced to the necessity of opening the examination to patrolmen or doing without a Chief of Police.

The Solicitor has set forth in parallel columns the provisions of Sections 143.34 and 143.341, Revised Code, governing the procedure both for promotions in the Police Department and in the Fire Department, and calls attention to the fact that they are not only identical, but differ widely.

I do not consider that we are to be too much concerned by these differences which the General Assembly saw fit to inject in one piece of legislation governing both of these departments. The two departments are totally unconnected and their functions are quite distinct, and the fact that the legislature concluded to deal with the one in a manner entirely different from the other, must be construed as a recognition of the differences, and in intention to deal with them quite independently. It seems highly significant that while Section 143.34, Revised Code, prior to the latest amendment, covered both the police and fire departments with the same provisions, the legislature decided to separate them and provide for them differently in two sections.

On one proposition I feel very certain, *viz.*, that the legislature did not intend to leave a city without a chief of police and without power to appoint one. It is my opinion, therefore, that we must give the statute in question, if possible without actual contradiction of its express terms, sufficiently liberal construction to accomplish what must have been the actual purpose and intent of the legislature. The law abhors a vacancy in a public office.

Although it may be conceded that the language of this section is somewhat involved and confusing, yet I believe that if we start with the assumption that the general assembly did not intend to make it impossible for a municipality to have a chief and other high officers in its police department, we should if possible, so construe the statute as to give the municipality that power.

Nor do I consider that we must do violence to any of its provisions. It is plain that any person who may be appointed as chief or other high officer must come up by promotion from a lower rank; accordingly it is

provided that "promotion shall be by successive ranks *so far as is practical.*" This expression appears at the outset to cast light on the provisions which follow.

It is then provided that whatever the civil service commission determines that there are *less than two* persons in the next lower rank (which may be only one *or none*) "who are eligible *and willing*" to compete, then such commission may allow persons who held positions in the next lower rank to compete with persons holding positions in the "rank lower than that of the position to be filled;" and successive declinations, would inevitably lead down to the rank of patrolman.

The provisions that "no person * * * shall be promoted to a position in a higher rank who has not served at least *twelve months in the next lower rank,*" would, standing by itself, seem to bar any appointment of a chief, if the officer in the next lower rank refused to take the qualifying examination. But that seemingly positive mandate must be construed in the light of all that precedes and follows. Ultimately we must come down to the patrolman, and the test of his qualifications would be twelve months of service as such patrolman.

I think we may well quote a further provision of Section 143.34, *supra*, as follows:

"* * * Whenever a vacancy occurs *in a position above the rank of patrolman* in a police department, *and there is no eligible list for such rank,* the municipal civil service commission shall, within sixty days of such vacancy, hold a competitive promotional examination. After such examination has been held and an eligible list established, the commission shall forthwith certify to the appointing officer the name of the person receiving the highest rating. Upon such certification, the appointing officer shall appoint the person so certified within thirty days from the date of such certification. If there is a list, the commission shall, where there is a vacancy, immediately certify the name of the person having the highest rating, and the appointing authority shall appoint such person within thirty days from the date of such certification." (Emphasis added)

This provision, following the matter quoted by the Solicitor, appears to contemplate a situation comparable to the one you present. The Civil Service Commission, after an attempt to establish an eligible list which has failed because those regularly qualified to enter the competition have declined to do so, is required to hold a *competitive* examination which so

far as the statute is concerned, would appear to be open to police officers regardless of their rank. As to this examination, there is no reference to "eligibility", and it appears to me that it is not affected by the fact that a patrolman is not in the next rank to that of the position which is to be filled. He is at least in the next available rank. This procedure would apply to filling a vacancy in any position above the rank of patrolman.

It is accordingly, my opinion that in case of a vacancy in the office of chief of police in a city, such vacancy, is, under the provisions of Section 143.34, Revised Code, to be filled by promotion from the next lower rank, in so far as is practicable; but when by reason of unwillingness of officers in the ranks below that of chief and above that of patrolman, to take the promotional examination, there are less than two applicants for such examination, patrolmen may be admitted to the examination, and the person receiving the highest rating shall be appointed as such chief.

Respectfully,
WILLIAM SAXBE
Attorney General